



Water Quality NewsFlash

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Construction General Permit – CAFO decision to affect how permits are written – CAFOs are concentrated animal feeding operations. The U.S. Court of Appeals for the 2nd Circuit issued a decision in *Waterkeeper Alliance v. EPA* (Feb. 28, 2005) related to NPDES permitting of CAFOs that may have significant impacts on stormwater permits for construction runoff. The Court said that EPA neglected to require substantive permitting agency review of a CAFO's Nutrient Management Plan (NMP). NMPs for CAFOs function similarly to the Storm Water Pollution Prevention Plans (SWPPP) developed for construction sites. The court said that NMPs constitute effluent limitations and should have been included as part of the permit. In addition, the Court determined that the public had a right to review the NMPs because they contained information by which compliance could be assessed and enforced.

http://www.ca2.uscourts.gov:81/isysnative/RDpcT3BpbnNcT1BOXDAzLTQ0NzBfb3BuLnBkZg==/03-4470_opn.pdf

This decision is related to earlier decisions including a San Francisco Superior Court decision (Nov. 14, 2003) pertaining to the Contra Costa and San Mateo stormwater permits (see *NewsFlash 04-21*). The Superior Court said that the permit must clearly specify the type and frequency of monitoring rather than having this information in a separate document. A related decision by the 9th Circuit in *Environmental Defense Center, Inc. v. EPA* (344 F.3d 832; 9th Cir. 2003) determined that review by the permitting agency and public participation are both needed for the storm water management plans developed by small municipalities regulated under the Phase II stormwater program. California is part of the 9th Circuit. The 7th Circuit issued a contrasting decision June 13, in which it held that construction project notices of intent (NOIs) and SWPPPs are not subject to the public participation requirements. Although an appeal to the Supreme Court is possible in situations of conflicting decisions, the agricultural industry decided not to appeal the 2nd Circuit CAFO decision reportedly because they did not want to jeopardize favorable aspects of the ruling such as the determination that permits are not needed for "potential" discharges, but only for actual discharges.

The CAFO and related decisions will affect the State Board's upcoming revision to the 1999 Construction General Permit (CGP). SWPPPs are currently written by the permittees, and provided to the Regional Boards only when requested. They are also not subject to prior public review. The current plan is to make the new CGP very prescriptive. If the Board adopts this approach, the CGP will likely include very detailed instructions regarding needed best management practices (BMPs) and the SWPPP will be reduced to a checklist. The municipal permits will not likely be affected since the Storm Water Management Plans, prepared by the permittees, are legally part of the permit and available for public review. The Caltrans statewide permit regulates Caltrans construction projects, however, Caltrans follows the technical requirements of the CGP. Current CGP including updated monitoring requirements:

http://www.swrcb.ca.gov/stormwtr/gen_const.html#const_permit

Last reminder! – *California Stormwater Quality Association (CASQA) 2005 Annual Conference* – Oct. 3, 4, and 5, 2005; Ontario, CA; for agenda & registration: <http://www.casqa.org/>

WQ NewsFlash is a weekly update of storm water and related news for the Department. *Verify information before taking action on these bulletins.* Contact Betty Sanchez, Betty_Sanchez@dot.ca.gov (916) 653-2115, or Fred Krieger, (510) 843-7889, fkrieger@msn.com with questions or to be added or deleted from e-mail list. Posted online at: <http://www.dot.ca.gov/hq/env/stormwater/publicat/newsflash/index.htm>